United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

76-4226

United States Court of Appeals

FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW FROM THE CIVIL AERONAUTICS BOARD

PETITIONER'S BRIEF

WILLIAM C. CLARKE
PETER F. VETRO
Attorneys for Petitioner British Airways Board
245 Park Avenue
New York, New York
(212) 983-5352

TABLE OF CONTENTS

Cases:

Decisions and Orders of the Civil Aeronautics Board:

BRIEF OF PETITIONER BRITISH AIRWAYS BOARD

Preliminary Statement

Nature of the Case and Prior Proceedings

This is a proceeding to review orders of the Civil Aeronautics Board (hereinafter "the Board" or "CAB") issued in its Docket No. 29778, a proceeding conducted pursuant to Part 213 of the Board's Economic Regulations, 14 CFR Part 213.

The principal order complained of—the Board's Order 76-9-74 (A.3)—was served upon the petitioner British Airways Board (hereinafter "British Airways") on September 17, 1976, without prior notice or any opportunity to be heard. That order, adopted by the Board under Section 213.3(c) of its Economic Regulations, purported to require British Airways to file with the Board its existing schedules of service to and from the United States by September 28, 1976 and all proposed schedules at least 30 days prior to inauguration of service thereunder. By the latter requirement it prohibited British Airways from inaugurating any new services or any change in its service as to frequency of flights, type of equipment used, number of passenger seats (by class of service) on aircraft normally assigned to a flight, days of operation of flights or the arrival or departure times of any flights, except after such changes had been filed with the Board in proposed schedules for at least 30 days. In short, the order decreed a continuing 30 day "freeze" at any given time on the operations of British Airways in this country, effective immediately when the order was served on September 17.

Section 213.3(c) of the Board's Economic Regulations provides in pertinent part that the Board may issue such

an order if it,

> ". . . finds that the government or aeronautical authorities of the government of the [foreign air carrier permit] holder, over the objection of the United States Government, have: (1) Taken action which impairs, limits, terminates, or denies operating rights, or (2) otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in [an] air transport agreement, of any U.S. air carrier designated thereunder . . ."

Section 213.3(d) of the regulation provides that the foreign carrier subject to such an order may continue to operate existing schedules and may inaugurate operations under proposed schedules 30 days after filing of such schedules with the Board,

> ". . . unless the Board with or without hearing issues an order, subject to stay or disapproval by the President of the United States within 10 days after adoption, notifying the carrier that such operations, or any part thereof, may be contrary to applicable law or may adversely affect the public interest. If the notification pertains to a proposed schedule, service thereunder shall not be inaugurated; if the notification pertains to an existing schedule, service thereunder shall be discontinued within 30 days after service of such notification."

The Board made the "findings" contemplated by Section 213.3(c) summarily based on its perception of facts from extra-record sources. There is no record from which the accuracy or completeness of those perceptions can be tested.

The Board's action was taken in the context of political consultations between the Governments of the United

Kingdom and the United States concerning the levels of airline capacity to be operated on the routes between the two countries during the 1976-77 winter period. These consultations were the latest in a series spanning several years on appropriate means of limiting excessive airline capacity in relation to traffic demand which is uneconomical for the airlines of both countries, results in higher fares to the public and is wasteful of scarce fuel resources. To this end argeement was reached between the two governments in September, 1974 to encourage their respective airlines to negotiate capacity limitation agreements directly, subject to the approval of the governments. That agreement was publicly announced by the governments on September 20, 1974 in a Joint Statement released in this country under a U.S. Department of State Press Release (A.60). Representatives of the two governments also reached agreement in August, 1975 that the two governments would consult, if necessary, on action to be taken in the event capacity negotiations by their carriers failed to produce agreement (Affidavit of R.D.H. Wilson, A.56).

Capacity limitation discussions between the U.S.—and U.K.—flag airlines did not produce agreement on the levels of capacity to be operated in the 1976-77 winter period with limited exceptions not satisfactory to one or the other of the governments.* Direct consultation between the two governments ensued. In the course of these discussions the United Kingdom Government advised the United States Government by note of August 12, 1976 that it found the levels of capacity proposed to be operated by the carriers of both countries on the London/Miami and London/Chicago routes would not bear the close realtionship to demand required by paragraph (3) of the Final Act of the

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* For example, an agreement reached between British Airways and National Airlines, Inc. regarding capacity on the Miami-London route was disapproved as to the winter 1976-77 period by the CAB in its Order 76-2-60, February 17, 1976.

Bermuda Civil Aviation Conference of 1946* and confirmed in subsequent understandings between the two governments. It further advised that it had decided to require the airlines of *both* countries to adhere to certain maximum numbers of flight frequencies with the wide-bodied aircraft they proposed to operate on these routes during the winter period commencing November 1, 1976 (Affidavit of R.D.H. Wilson, A.55-56).** The United States government objected to this action and further consultations took place which included discussion of possible retaliation and of counter-retaliation. A compromise settlement on terms satisfactory to both governments was eventually reached on or about October 6, 1976.

In view of the immediate impact of Order 76-9-74 denying British Airways the right to alter any aspect of its schedules except on at least 30 days' notice, placing it under the threat of imminent disapproval of existing schedules and the substantial penalties, both civil and criminal, provided for noncompliance, British Airways applied to the Board for a stay of the order pending judicial review (A.6). On September 30, 1976 the Board denied this application by its Order 76-9-161 (A.33). The Board did, however, by a 3-2 divided vote, partially stay the order insofar as it would otherwise have prevented British Airways from initiating a new weekly frequency of its premier Concorde service between Washington and London, long planned to commence on October 5, 1976 and fully sold to the public for many weeks thereafter.

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* The Air Service Agreement and Final Act of the Bermuda Civil Aviation Conference, done at Bermuda, February 11, 1946, 60 Stat. 1499, T.I.A.S. 1507, as amended T.I.A.S. 1609 (1966) (commonly and hereinafter called "the Bermuda Agreement."). The Bermuda Agreement is reproduced at A.82.

** We emphasize that the action proposed by the United Kingdom would have fallen with equal force upon British Airways and its U.S.-flag competitor on each of the two routes involved because this is not at all clear from the Board's description of events in its orders.

Just prior to its action on British Airways' stay application the Board, on September 29, adopted a proposed order (A.30) pursuant to Section 213.3(d) of its Economic Regulations requiring a reduction in British Airways' services between London and Los Angeles. This order was also adopted without notice or hearing and British Airways was in fact unaware of its existence for some time after its adoption. This order was transmitted by the Board to the President for his consideration of whether to stay or disapprove it as provided in Section 213.3(d).

On October 9, 1976 President Ford transmitted a letter to the Board's Chairman (A.39), advising that since the issues that gave rise to the Board's proposed order to restrict British Airways' Los Angeles-London services had been satisfactorily resolved with the British authorities, that order was disapproved. The President further stated as follows:

> "I have further determined that prompt rescission of the Board's order 76-9-74, which requires the carrier to file with the Board its existing and proposed schedules, would be appropriate and in the interests of our foreign policy."

On October 21, 1976, after receiving advice from the Board's General Counsel that notwithstanding the President's request, the Board was not disposed to rescind its Order 76-9-74 while British Airways remained in noncompliance, British Airways filed a petition for review of that order in this Court (A.40). The petition was accompanied by a motion for a stay of Order 76-9-74 pending review (A.42), the affidavit of R.D.H. Wilson as United States Manager for British Airways in support thereof (A.44) and a memorandum of law.

On October 26, 1976, the Board adopted its Order 76-10-110 (A.62) which purported to partially vacate its Orders 76-9-74 and 76-9-161 so as to terminate their effec-

tiveness *nunc pro tunc* as of October 8, 1976. As stated by the Board (A.64-65) the purpose of this order was to strike a balance between the Board's desire to respect the President's request to rescind Order 76-9-74 and its desire to preserve a basis of "enforcement liability" against British Airways for noncompliance. The intended effect of the order, according to the Board, is to selectively preserve enforcement liability for noncompliance with that portion of Orders 76-9-74 and 76-9-161 which required the filing of *existing* schedules, but to absolve British Airways from its failure to comply with the requirement to file proposed schedules.* In light of the provisions of Section 1006(d) of the Federal Aviation Act of 1958 (hereinafter "the Act") vesting this Court with exclusive jurisdiction to affirm, modify or set aside Order 76-9-74 after the petition for review was filed, the Board made its Order 76-10-110 "subject to any necessary approval" of this Court (A.65).

While finding it regrettable that the Board waited until British Airways had filed an extensive motion for a stay in this Court before issuing Order 76-10-110, nevertheless, in light of that order and an undertaking of the Board not to commence enforcement action during the pendency of this appeal except after adequate notice, British Airways consented to withdrawal without prejudice of its pending motion for a stay pending review in a stipulation filed and approved by the Court (A.66). The stipulation expressly provides that it is not a consent by British Airways to any necessary approval by this Court of the Board's Order 76-10-110.

Less than a month after the stipulation was approved, counsel for the Board advised British Airways by letter

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* The irreparable harm of the continuing requirement to delay schedule changes at least 30 days was the principal basis for British Airways' motion for a stay then pending in this Court. See, Affidavit of R.H.D. Wilson, A.44, 47-52.

pursuant to the stipulation that the Board's Bureau of Enforcement would institute an administrative enforcement proceeding against British Airways for noncompliance with the Board's Order 76-9-74 unless British Airways renewed its motion for stay (A.72). British Airways has not renewed its motion and no action has as yet been taken by the Board's Bureau of Enforcement.

In light of the developments since its petition for review was filed, British Airways amended its petition for review to include review of the Board's Orders 76-9-161 and 76-10-110 as well as Order 76-9-74 (A.69).

The Parties

British Airways is a public corporation of the United Kingdom of Great Britain and Northern Ireland. It is engaged throughout the world in the transportation of persons, property and mail by air. It has been designated by the United Kingdom Government as a carrier to exercise rights to conduct scheduled air services to and from the United States accorded by the Bermuda Agreement. It is a "foreign air carrier" within the meaning of Section 101(19) of the Federal Aviation Act of 1958 and holds two foreign air carrier permits issued pursuant to Section 402 of the Act, approved by the President as provided in Section 801 of the Act (A.74, 78).* The services of British Airways, through its corporate predecessors, antedate the Civil Aeronautics Act of 1938 and its basic permit traces its ancestry back to "grandfather rights" accorded by that Act. In the United States British Airways currently provides regularly scheduled international air services at New York, Boston, Philadelphia, Washington, Miami, Detroit,

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* British Airways' basic foreign air carrier permit (A.74) contains route authority covered by the Bermuda Agreement. Its permit authorizing service to Anchorage (A.78) was granted in the "public interest" to assist in the development of Alaska.

Chicago, Los Angeles and Anchorage. Its United States operations are headquartered in New York.

The Board is an independent regulatory agency existing pursuant to Section 201 of the Act, exercising Commerce Clause powers by specific delegation from Congress.

The Effects Of Order 76-9-74 Upon British Airways

The most immediate impact of Order 76-9-74, and the object of British Airways' first concern, was that it would have required cancellation or postponement of the introduction of a third weekly frequency of service with the supersonic Concorde aircraft on the London-Washington route, long planned to commence October 5, 1976. The resources for the service were committed; it had been held out to the public; reservations and ticket sales had been made for as many as 45 weeks after October 5; and numerous flights were fully booked, including the initial ones in both directions. As previously noted, the Board by a 3-2 divided vote alleviated this impact in its Order 76-9-161 (A.33), granting a partial stay.

Beyond the immediate impact on Concorde service, Order 76-9-74 prohibited British Airways from making any other changes in the frequency of any of its services except after filing at least 30 days in advance with the Board for its approval. At the time the order was issued it happens that no major schedule changes as to frequency (as distinguished from equipment type and seating configuration) were planned until October 31 when British Airways made a seasonal changeover from summer to winter schedules. However, the denial of the right to make such changes on less than 30 days' notice was, nevertheless, significant. For example, if a competitor reduced its frequency on a route (as has happened) British Airways would suffer an arbitrary delay in introducing a new frequency to meet unserved demand. Similarly, should a competitor have increased its frequency of service, British Airways could

not match the change competitively until at least a month later.

The most immediate impact of the frequency restriction in Order 76-9-74, after the Board modified it with respect to the new Concorde service, was that it virtually precluded the operation of extra sections of flights. When passenger reservations demand significantly exceeds the seating capacity of an aircraft committed to a flight, British Airways frequently will schedule another aircraft to operate as a second section of the flight. This is done to meet traffic peaks at holiday times such as Thanksgiving and Christmas and other peaks such as are experienced on days preceding or following the weekend fares surcharge, the days preceding a fare increase, a flight cancellation by a competitor, etc. Also extra sections are scheduled to suit the operational convenience of British Airways, such as returning to the United Kingdom an aircraft delayed here for mechanical reasons or which came into the U.S. as a charter flight. Rather than fly the aircraft empty across the North Atlantic, British Airways will open it for sale as an extra section or additional flight for whatever passenger, cargo or mail revenues it can earn. Whether scheduled in response to experienced reservations demand or to suit the operational convenience of British Airways, extra sections are not normally scheduled more than 30 days in advance and, therefore, were virtually barred by the terms of Order 76-9-74.

Of great commercial and operating significance were the restrictions of Order 76-9-74 against changing equipment type or the seating configuration used on the aircraft "normally assigned" to a flight except at least 30 days after proposed schedules were filed for Board approval. At the time the order was issued British Airways was operating approximately 168 scheduled flights per week to and from U.S. points and was using five different aircraft types in these operations (BAC Concorde, Boeing 747, Boeing 707, BAC VC-10 and Douglas DC-10). These aircraft types

vary widely in their respective seating capacities and as to several of them British Airways operates more than one "standard" seating configuration.* Under its foreign air carrier permits and its operations specifications issued by the Federal Aviation Administration British Airways has the right to utilize any of these aircraft types and configurations (other than the supersonic Concorde which is subject to special FAA limitations) in any of its services in the U.S. as the requirements of its business and demands of the public may dictate.

In this connection it is significant to note that in scheduling British Airways' fleet of some 173 jet aircraft over its route system which spans more than 200 cities in 80 countries around the world, individual airplanes are not normally dedicated to a particular U.S.-U.K. route, but are rotated on a much more complex operating schedule over the route system. For example, a Boeing 747 airplane operating from New York to London may then proceed on to Hong Kong or Sydney, Australia. These equipment rotations are carefully planned to achieve the best possible balance between public demand (i.e., having the right size and configuration of aircraft in the right place at the right time for the traffic, taking account of seasonal, day of week and time of day traffic variations), aircraft utilization (i.e., minimizing the time a multi-million dollar asset is idle), and maintenance requirements (i.e., insuring that each aircraft of each type and each engine of each type arrives in London for its cyclical overhauls, maintenance, cleaning, painting and the like on a schedule that spreads the work

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* For example, British Airways operates Boeing 747 aircraft configured for 404 seats (28 first class, 376 economy), 377 seats (28 first class, 349 economy) and 431 seats (23 first class, 408 economy). For the Boeing 707 it operates configurations of 146 seats (16 first class, 130 economy), 140 seats (20 first class, 120 economy) and 180 seats (all economy). Also this aircraft has the capability of changing seating configuration on an *ad hoc* basis by moving a bulkhead between the first class and economy sections and snapping in seats as required.

fairly evenly in the maintenance shops). Obviously, in this complex and dynamic process a change anywhere on the system can necessitate changes elsewhere in the system and a requirement such as Order 76-9-74 imposed, arbitrarily precluding changes in the U.S. on less than 30 days' notice to the Board, has a serious adverse impact.

The foregoing observations with respect to changes of equipment types and configurations are applicable, although to a lesser degree, to the prohibition in Order 76-9-74 against changing the scheduled days or times of operation of flights on less than 30 days' notice. Normally, British Airways would try to avoid changes of this type whenever possible since these (as distinguished, for example, from seating configurations) represent the product it advertises to the public and travel agents and there is considerable marketing resistance to changing a timetable that has become familiar. Nevertheless, in the complex process of scheduling just described such changes are sometimes made and British Airways had the unquestioned right to make them until Order 76-9-74 was issued.

There is nothing theoretical or speculative about the impact of Order 76-9-74 upon the scheduled operations of British Airways in this country. Apart from the previously mentioned change in its Concorde schedule, there were other changes planned to take effect (and in fact implemented) within the first 30 days after the order was issued. Thus, in connection with a planned seasonal reallocation of capacity, British Airways' flights 560 and 561 (operating between London, on the one hand, and Boston and Philadelphia on the other), which had been operating as daily 747 flights through the summer, were each changed to a mixture of three VC-10 and four 747 aircraft per week effective October 10, and further changed to daily VC-10 services on October 25. Other changes were implemented after the order was in effect for 30 days but before it was partially vacated on October 26 (e.g., flights no. 500 and

501 between London and New York were changed from daily 747 aircraft to a weekly mix of VC-10 and 747 aircraft with effect October 23).

The matters described above represent the direct operating restrictions imposed on British Airways by Order 76-9-74. Insofar as the order was also a predicate for further action under Section 213.3(d) of the Economic Regulations (the necessary "findings" having already been made in Order 76-9-74), it had other damaging effects as well. British Airways was naturally concerned about the commercial impact of the order, particularly the shadow it cast over the reliability of British Airways' services. It was feared that professional travel agents (who account for approximately 75% of British Airways' passenger business), being aware of the order and its implications, might perceive it as their duty to their clients to steer passengers to other carriers as happens when a carrier's services are threatened by a strike. Similarly, it was feared that the order might produce a decline in long-term advance bookings by tour operators which were then coming in for the 1977 summer season. Finally, there was concern that the uncertainties created by the order could unfavorably affect the availability or terms of U.S. commercial financing for the approximately $364 million in new aircraft British Airways then had on order in this country, some of which financing was then currently in negotiation.

Background and Structure of the Part 213 Regulation

Part 213 of the Board's Economic Regulations had its genesis in the *Foreign Air Carrier Permit Terms Investigation,* CAB Docket No. 12063, initiated by the Board's Order E-16288, January 18, 1961. The investigation was established to consider whether to make the foreign air carrier permits of scheduled foreign airlines subject to the regulation as a term, condition or limitation. The Board indicated that a decision to adopt the regulation would be

submitted to the President for approval under Section 801 of the Act.

Motions to dismiss the investigation for lack of jurisdiction made by various foreign carriers, based upon the inconsistency of the proposed regulation with Sections 402(f), 801 [now 801(a)], and 1102 of the Act and various air services agreements with foreign countries, were denied by the Board in its Order E-17235, July 27, 1961 (34 CAB 840). Petitions for reconsideration of this order were denied by Order E-17537, October 4, 1961 (34 CAB 838). A motion for stay of the proceeding pending judicial review was denied by Order E-17797, December 4, 1961 (34 CAB 837).

A petition of foreign airlines for review of the Board's order commencing the investigation was dismissed by the Court of Appeals for the District of Columbia for lack of jurisdiction on the ground that Section 1006(a) of the Act did not authorize review "now or later" in that Court of the proposed regulation "since it is '[an] order in respect of * * * foreign air carrier[s] subject to the approval of the President' under Section 801 of the Act." *British Overseas Airways Corp.* v. *CAB*, 304 F. 2d 952, 952-953 (D.C. Cir. 1962).* The dismissal was made without prejudice to independent proceedings in a district court, the Court noting as to its finding that it lacked jurisdiction,

> "This is not to say that there may not be a judicial remedy against administrative, or even Presidential, action beyond the scope of lawful authority, as defined by the Aviation Act." 304 F. 2d at 953

A subsequent action on behalf of foreign airlines in the United States District Court for the District of Columbia

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* It may be noted that British Overseas Airways Corporation was the corporate predecessor of British Airways.

to enjoin the Board from proceeding with the investigation for lack of jurisdiction to adopt or implement the regulation was dismissed for want of jurisdiction on the ground that the Board's action commencing the investigation was not final. *British Overseas Airways Corp.* v. *Boyd,* Civil No. 3315-62, Order entered January 9, 1963.

A public hearing was held in the investgiation before an Examiner of the Board who issued a decision recommending that the regulation not be adopted on the grounds that the record did not support a need for it and it would represent an unwarranted departure into unilateral restrictionism that would invite rather than deter similar actions by foreign governments. Recommended Decision of Examiner Edward T. Stodola, CAB Docket No. 12063, served June 21, 1962. In discussing the lack of record support the Examiner noted the inability of the Board's staff as proponents of the regulation to supply proof of need and the unwillingness of the Department of State to appear, as reflected in a letter to him stating, ". . . the Department wishes to advise you that it will make its views known to the Civil Aeronautics Board on a confidential basis when this case reaches the Board for final consideration" (Ibid., p. 79).

After receiving briefs and oral argument upon exceptions to the Examiner's recommended decision the Board took no action in the investigation for more than *seven years.* Then the Board (only two of whose members had been appointed when the case was argued), without further proceedings, adopted Order 70-6-32, April 23, 1970, making the permits of foreign scheduled airlines subject to the regulation. President Nixon approved this order by letter of June 3, 1970 (A.73). In adopting Part 213 the Board in Order 70-6-32, pp. 3-4, noted that it had been able to attach schedule limitations to foreign air carrier permits in appropriate cases under normal Section 402(f) procedures, but asserted that it saw a "crying need" for a faster and

less cumbersome way to do this which Part 213 would provide.

As originally adopted, Part 213 did not contain the language now contained in clause (2) of Section 213.3(c), permitting the Board to base a Section 213.3(c) order upon a finding that the government of the foreign air carrier permit holder has

> ". . . denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights, provided for in such air transport agreement, of any U.S. air carrier designated thereunder with respect to flight operations to, from, through, or over the territory of such foreign government."

That language was added by subsequent amendment, the Board's Regulation ER-870, November 11, 1974 (39 FR 30842). That amendment was adopted without a Section 402(f) hearing. The amendment was approved by President Ford on August 21, 1974.

The background, purposes and history of Part 213, together with some of the legal questions it raises, are discussed in Lowenfeld, "CAB v. KLM; Bermuda at Bay," 1 *Air Law* 2 (1975) and DeSaussure, "The Civil Aeronautics Board and Foreign Air Carrier Permits," *1 Air Law* 146 (1975).

Part 213 contemplates a two stage procedure for taking action against the schedules of a foreign airline whose government has committed an act or omission deemed improper under a bilateral air services agreement with the United States. The first stage is an order under Section 213.3(c) which the Board issues on its own initiative requiring the carrier to file its existing and proposed schedules with the Board. The second stage is an order under Section 213.3(d) to disapprove existing or proposed schedules which the Board issues subject to stay or disapproval

of the President within 10 days.* Both orders are issuable without notice or hearing and the findings required to support both orders are identical.

This proceeding, of course, concerns only the first stage order issued by the Board without Presidential approval, the President having disapproved the Board's second stage order to curtail British Airways' Los Angeles-London schedules. Very little is said in the proceedings leading to adoption of Part 213 or in published commentary thereon about the first stage order issued solely by the Board. Perhaps understandably, most attention was focused on the more drastic measure of disapproving schedules in the second stage order. In any case, we have been unable to find any discussion in the Part 213 record that indicates the slightest awareness of the serious implications of a first stage Part 213 order if it is imposed upon a carrier whose scheduled operations in the U.S. are as varied and complex as those of British Airways previously discussed. Apparently this order was conceived of as largely symbolic—a sort of warning shot over the bow. As stated by Professor Lowenfeld who was concerned with aviation matters in the Department of State during most of the time Part 213 was under consideration:

> "Of course, such filing of schedules would be purely symbolic: the CAB has no difficulty finding out the schedules of any carrier by a telephone call to the airport or a glance at the Official Airline Guide. But the United States carriers have always resisted, with U.S. Government support, any requirement for filing of schedules (other than for information) with any other government, because such a move might imply the opportunity for approval or disapproval, and might thus be the first step to the dreaded concept of predetermination." Lowenfeld, "CAB v. KLM; Bermuda at Bay," *supra*, p. 9.

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* It may be noted that Section 801(a) of the Act speaks of affirmative approval of the President and prescribes no time limitation for this.

Jurisdiction of the Court

This Court has jurisdiction under Section 1006(a) of the Act which provides in pertinent part as follows:

> "Any order, affirmative or negative, issued by the Board . . . under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States . . . upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order."

Orders 76-9-74, 76-9-161 and 76-10-110 are orders of the Board which are not subject to the approval of the President, as to which British Airways, disclosing a substantial interest, has filed a timely petition for review. All proceedings in the Board's Docket No. 29778 are now complete and the orders are in every respect final and ripe for review.

ARGUMENT

I.

The Board was without authority to issue Order 76-9-74 which violates Sections 402(f), 801(a) and 1102 of the Act and Paragraph (4) of the Bermuda Agreement Final Act.

A. Order 76-9-74 Effected An Amendment Or Suspension of Operating Authority Contained in British Airways' Foreign Air Carrier Permit Without Notice, Hearing or Presidential Approval In Violation of Sections 402(f) and 801(a) of the Act.

1. Order 76-9-74 Amended or Suspended Operating Rights Contained in British Airways' Permits

We think it clear that the Board's Order 76-9-74 effected an alteration, modification, amendment or suspension of

operating authority contained in British Airways' foreign air carrier permits (A.74, 78). Those permits by terms authorize "foreign air transportation"* over the routes described therein without limitation as to the frequency of service, type of equipment used, numbers of passenger seats thereon or the days and times of day when flights are operated. Order 76-9-74 purported to impose restrictions in each of these respects upon the operations conducted under the permits by requiring that no changes be implemented except after at least 30 days' advance filing of a proposed schedule with the Board.

The right to add or change schedules and equipment or accommodations that the Board purported to restrict in Order 76-9-74 is so fundamentally important to the operations of a scheduled airline that Congress saw fit to flatly prohibit the Board from restricting it in the case of U.S. scheduled airlines. Thus, Section 401(e)(4) of the Act provides in pertinent part as follows:

> "No term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require . . ."

We do not, of course, contend that the prohibition of Section 401(e)(4) by terms limits the Board and the President in respect of the terms, conditions and limitations of a foreign air carrier permit.** Rather, we cite that section

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* Defined in Section 101(21) of the Act to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between . . . a place in the United States and any place outside thereof; whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

** We do contend, however, that the "fair and equal opportunity" provision of the Bermuda Agreement operates in practical effect to extend this prohibition to the basic permit of British Airways. See, pp. 31-34, *infra*.

to underscore the significance of the rights restricted in the Board's Order 76-9-74 and the substantial nature of the alteration of operating rights effected by that order.

The Board appears to contend in its Order 76-9-161 (A.33) that Order 76-9-74 did not work any substantive amendment of British Airways' operating rights. There the Board stated:

> "[T]he Board finds no significant adverse impact arising from the order directing the filing of British Airways existing schedules by September 28, 1976, and its proposed schedules 30 days in advance of inauguration. The order merely requires, pursuant to the Presidential approval procedures of Part 213, that British Airways' schedules be filed with the Board in order that the Board may consider whether such schedules may in fact be 'contrary to applicable law or may adversely affect the public interest.' Adverse impact upon British Airways will result only from a subsequent order (subject to stay or disapproval by the President) actually disapproving such schedules." (A.34-35)

The fact that these statements were made in the same order in which the Board, by a closely divided vote, granted a partial stay of Order 76-9-74 insofar as it would otherwise have precluded the inauguration of British Airways' new Concorde service on October 5 is answer enough to the Board's position. An order issued under Section 213.3(c) is *not* simply an order to file schedules and to suggest otherwise is to merely play with words. The requirement in Order 76-9-74 to file proposed schedules "at least 30 days prior to inauguration of service" (A.5) necessarily means that service cannot be inaugurated until at least 30 days after a schedule is filed. Any possible doubt of the meaning is eliminated by Section 213.3(d) of the regulation which provides in pertinent part:

> "The carrier . . . may inaugurate operations under

proposed schedules 30 days after the filing of such schedules with the Board, unless . . ."

We have sufficiently demonstrated the serious impact of this substantive requirement upon British Airways' operating rights in our Preliminary Statement, *supra*.

2. Sections 402(f) and 801(a) Required Notice, Hearing and Presidential Approval for the Board's Action In Order 76-9-74 And Its Further Refusal to Obey the President's Request to Rescind the Order Violates Section 801(a)

Section 402(f) of the Act sets forth the Board's power to alter, modify, amend or suspend a foreign air carrier permit as follows:

> "Any permit issued under the provisions of this section may, *after notice and hearing,* be altered, modified, amended, suspended, cancelled, or revoked by the Board whenever it finds such action to be in the public interest." (emphasis added)

As previously noted the Board issued its Order 76-9-74 summarily, with no notice and no opportunity for British Airways to be heard. In this the order was plainly adopted in violation of Section 402(f).

Section 801(a) of the Act provides in pertinent part as follows:

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any . . . permit issuable to any foreign air carrier, under section 402, shall be subject to the approval of the President."

Order 76-9-74, which as we have demonstrated, amended or suspended operating rights contained in British Airways' permits, was not made subject to Presidential approval and has, in fact, been maintained in effect by the Board in

disregard of a specific request by the President that it be promptly rescinded (A.39). In this the Board's action in issuing the order plainly violated Section 801(a).

While the statutory requirements for notice, hearing and Presidential approval do not depend upon a showing of need therefor in any given case, it may, nevertheless, be observed that the Board's actions in Order 76-9-74 and the subsequent orders modifying it did substantial violence to the statutory purposes. There was a genuine need for a hearing before the Board in this case, notwithstanding the Board's observation that British Airways' request to be heard "seems particularly inappropriate from a government-owned carrier which in fact participated in the intergovernmental negotiations . . ." (Order 76-9-161, A.33, 36).* As demonstrated by the Board's grant of a partial stay for British Airways' Concorde service and its opinion that there was no "adverse impact" of its order, the fact is the Board clearly did not comprehend the consequences its Order 76-9-74 would have upon British Airways' operations. Developing a record showing the consequences of a proposed action would seem to be one of the most basic functions of a hearing, and there was every reason to hear British Airways on that question before the order was adopted. British Airways is *not*, after all, the British Government; it is a scheduled common carrier by air serving the transportation needs of nine U.S. cities among many others. Regulatory actions that disrupt its operations fall first, and much more directly, upon those who rely upon its services than the British Government.

British Airways was also entitled to be heard with respect to the alleged violations of the Bermuda Agreement by the United Kingdom which underlie the Board's action in Order 76-9-74. If, as the Board clearly believes, the

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* Presumably the Board had reference to the fact that interested British *and U.S.* carriers (the latter through their trade associations) are generally given observer status at formal consultations under the Bermuda Agreement.

Board may unilaterally determine for the United States that a foreign government has violated an international agreement (without recourse to the arbitration provisions prescribed by the agreement*), then at the very least it is incumbent on the Board to develop and disclose the basis for its action rather than make conclusory assertions as was done in Order 76-9-74. In fact what the United Kingdom did (i.e., propose unilateral limitations on capacity it found excessive under the Bermuda Agreement capacity clauses after consultations had failed to resolve the matter) is exactly what the Board has asserted the right to do under Bermuda-type agreements in its 1974 amendment of Part 213. Regulation ER-870, November 11, 1974 (39 FR 30842). See, Lowenfeld, "CAB v. KLM; Bermuda at Bay," *supra,* and DeSaussure, "The Civil Aeronautics Board and Foreign Air Carrier Permits," *supra.* The only difference is that the United Kingdom's action was equally directed to its own carrier whereas the Board would act only against foreign carriers. Some rational distinction between the Board's own actions and what it found to be improper predetermination of capacity by the United Kingdom was owing from the Board in Order 76-9-74 and an adversary hearing would have insured that the issue was developed.

British Airways also should have been heard with regard to the Board's findings that there had been denial of a "fair and equal opportunity" and, particularly, upon the underlying conclusion that the action proposed by the United Kingdom would cause traffic diversion from U.S. carriers to British Airways (A.4). For all that appears the Board was not even conscious of the fact that the United Kingdom's proposed action would have fallen with equal force upon British Airways.

The violence done by the Board's actions here under review to the purposes of Section 801(a) is most substantial. It is well established that that section makes the Board's role one simply of an adviser to the President regarding actions with respect to foreign air carriers under

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* Article 13 of the Bermuda Agreement.

Section 402. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948). As Mr. Justice Jackson stated in his famous opinion in that case:

> "But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country . . . Congress has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication can even take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order . . . Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies." 333 U.S. at 109

The role of the Board in relation to the President in Section 402 proceedings was well described by former CAB Chairman Durfee in *British Overseas Airways Corporation, Permit Amendment*, 29 C.A.B. 583, 594 (1959), as follows:

> "To equate the Civil Aeronautics Board with the U.S. Government in this process is to overlook the division of functions provided for by Congress in the Federal Aviation Act. The Board has a role in which it is required to evaluate economic considerations; the State Department has a role as adviser to the President on diplomatic and foreign relations matters; and the

final decision for the U.S. Government is with the President."

In view of the established subordinate and advisory role of the Board in regard to foreign permits, the role the Board has assumed in this case is truly astonishing. Consider that the Board, in the context of intergovernmental consultations under an international agreement, unilaterally and summarily issued Order 76-9-74 on purely political grounds, acting in its own words "as an independent agency of the United States Government" (A.64). The Board's action was promptly followed by a serious adverse action of the United Kingdom.* The President faced a situation in which America and its oldest ally were threatening resort to mutual retaliation as a means of resolving their differences. High level diplomatic conversations were initiated to supplement the unsuccessful discussions at the aviation technical level. A compromise was eventually worked out on North Atlantic capacity; the United Kingdom deferred action on Hong Kong-Sydney rights; and the President disapproved the proposed order to curtail British Airways' Los Angeles-London rights and requested "prompt rescission" of Order 76-9-74 "in the interests of our foreign policy" (A.39). However, the Board, after considerable delay (and initiation of this review proceeding) determined not to honor the President's request, deeming it offensive to the Board's role as an "independent" agency (A.64).

The casualty in this process was the President's "positive and detailed control over the Board's decisions" with regard to foreign carrier permits discussed in the *Waterman* case, deriving from Section 801(a) of the Act and the President's Constitutional power to conduct foreign policy.

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* The United Kingdom gave notice on September 23, 1976 that it would decline to extend a previously established September 30, 1976 deadline for termination of service between British Hong Kong and Sydney, Australia by Pan American World Airways. Extension of this termination date had been under discussion in the consultations.

The Board as an independent regulatory agency had no business taking summary political action in Order 76-9-74 in the first place without explicit Presidential approval. Having done so, it compounded the error when it refused the request of the President to rescind the order in Order 76-10-110.

3. Part 213 As Invoked By the Board Is Not A Condition Attached to British Airways' Permit and the Board Cannot In Any Event Avoid the Requirements Of Sections 402(f) and 801(a) By A Permit Condition

Apparently sensing the weakness of its contention that Order 76-9-74 had no adverse effects upon British Airways' operating rights, the Board in Order 76-9-161 gave as a further ground justifying its action the following:

> "It further may be observed that, even to the extent there may be some adverse impact upon British Airways resulting from the order, that adverse impact is one to which British Airways' operating rights are specifically subject. Part 213 was adopted, after full hearings and Presidential approval, as a permit amendment proceeding in which British Airways' permit was made subject to the provisions of that Part. Thus, the Part 213 procedures constitute a condition to British Airways' foreign air carrier permit. The implementation of such procedures, pursuant to that condition, can constitute no deprivation of rights of the carrier. See, *Dan-Air Services Ltd.* v. *C.A.B.*, 475 F. 2d 408 (C.A.D.C., 1973)" (footnotes omitted) (A.35-36)

Before treating with the legal merits of this position, we would point out that it is factually in error. The Board's action in Order 76-9-74 was based in part at least upon the findings called for in clause (2) of Section 213.3(c) which, as previously noted, was added to Part 213 as an amendment without a Section 402(f) hearing (C.A.B. Regulation ER-870, November 11, 1974, 39 FR 30842).

Clause (2) of Section 213.3(c) is not even arguably a condition included in British Airways' permits and, to the extent the Board's action in Order 76-9-74 was based upon the findings called for by that clause, the Board could not have been acting pursuant to a permit condition.

Even if the Board were factually correct in regarding Part 213 as a condition attached to British Airways' permits, its argument falls on legal grounds. The Board is a creature of Congress that may exercise only those powers conferred by Congress and in the manner prescribed by Congress. Congress has prescribed that foreign air carrier permit authority shall be amended or suspended only after notice and hearing and with approval of the President. The Board is not free "bootstrap" itself out of these limitations in its statute mandate by the expedient of attaching conditions to permits that effectively reserve to the Board the right to reconsider and amend or suspend the authority granted without following the procedures required by Congress. This is so even when the Board finds that the procedures Congress has prescribed are too cumbersome and time consuming and sees a "crying need" to bypass them, as it did in adopting Part 213. *Foreign Air Carrier Permit Terms Investigation*, C.A.B. Order 70-6-32, *supra*.

This question was decided in *C.A.B.* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961), a case arising from this Circuit. There the Supreme Court affirmed this Court's decision to set aside an order of the Board attaching limitations to Delta's certificate without notice and hearing after it became effective, notwithstanding that the Board had prior to the effectiveness of the certificate, specifically reserved the right to reconsider its decision upon deciding the merits of petitions for reconsideration. The Court held that the Board was obliged to follow the notice and hearing requirement of Section 401(g) of the Act to amend, modify or suspend certificate authority in terms fully applicable here:

> ". . . [T]he fact is that the Board is entirely a creature of Congress and the determinative question

is not what the Board thinks it should do but what Congress has said it can do. * * *

". . . We are not saying that the Board cannot entertain petitions for reconsideration after effective certification, nor are we holding that such petitions cannot be *denied* summarily; all we hold is that the petitions cannot be granted and the certificated carrier's operations curtailed without notice or hearing. * * *

". . . [T]he power the Board asks for in this case seems nothing more or less than the power to do indirectly what it cannot do directly. Parenthetically, it should be noted that, for purposes of this dispute, it is difficult to draw a distinction between a petition for reconsideration filed by a party and one initiated by the Board sua sponte . . . This being the case, it is all the more significant that the Court in United States v. Seatrain Lines, Inc. 329 U.S. 424, 91 L ed 396, 67 SCt 439, while overruling the Interstate Commerce Commission's contention that it had inherent power to reconsider effective certificates, paid no attention to the fact that the Commission had made the original certificate effective, subject 'to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.'

". . . [I]t bears repetition that we are *not* deciding that the Board is barred from reconsidering its initial decision. All we hold is that, if the Board wishes to do so, it must proceed in the manner authorized by statute. Thus, for example, the Board may reconsider an effective certificate at any time if it affords the certificated carrier notice and hearing prior to decision * * *

". . . We do not think it too much to ask that the Board furnish these minimum protections as a matter of course, whether or not the Board in a given case might think them meaningless. It might be added

that some authorities have felt strongly enough about the practical significance of these protections to suggest that their presence may be required by the Fifth Amendment. * * *

". . . Finally, the decision which is analytically most relevant to this case, United States v. Seatrain Lines, 329 U.S. 424, 91 L ed 396, 67 S Ct 439, *supra*, furnishes support for respondent, rather than petitioners. While Seatrain may be distinguishable on its facts, the Court spoke in general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act . . . [T]o the extent that a broad observation is permissible, we think that both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute." 367 U.S. at 322-334

The decision in *Dan-Air Services Ltd.* v. *C.A.B.*, 475 F. 2d 408 (D.C. Cir. 1973), cited by the Board in support of its action, is distinguishable on its facts. There the Board had invoked a condition contained in foreign charter permits from their inception to require advance filing and approval of charter flights to insure their *compliance* with the terms of the permit. The information the Board required the carriers to file was information they were required to compile in advance of each charter flight in any event under the Board's charter regulations. The Board invoked the advance approval condition upon substantial evidence that the carriers were conducting charters in violation of their permits, including the fact that several of the Board's own employees, who did not meet any of the applicable charter eligibility requirements, in response to improper public solicitation, had bought pas-

sage at an improper fixed price upon the petitioners' services and none of the Board employees requesting such transportation was denied it. The Board's action in invoking the advance approval condition did not diminish one iota the *operating authority* contained in the petitioners' charter permits but simply insured the operations conducted were those authorized. The Court's determination that the invocation of that condition by the Board did not constitute an amendment of the permits without notice, hearing and Presidential review, must be read in light of that salient fact. Any broader reading of the decision would place it in conflict with the Supreme Court's decision in the *Delta* case discussed above.

4. The President Could Not Have Delegated His Responsibility to Approve Board Decisions Under Section 801(a) of the Act to the Board; He Has Not Done So; And Any Delegation That Could Be Implied From His Approval Of Part 213 Was Specifically Revoked By His Request for Rescission of Order 76-9-74.

In regard to the requirement of Section 801(a) of the Act for Presidential approval, the Board to some extent relied upon a theory of Presidential delegation in adopting Part 213. Thus, in its Order E-17537 (34 CAB 838, 840) on reconsideration of motions to dismiss the proceeding, the Board stated:

> "Certain of the petitioners further contend that, under the proposed part 213, the Board and not the President would perform the actual functions of requiring submission of traffic data and schedules and the approving and disapproving of such schedules. The simple answer to this contention is that the President alone must decide whether to approve or disapprove the proposed amendment of the foreign air carrier permits. As to how the new part 213 would be administered in the event the President should approve the proposed regulation is a matter for the President

> to decide. If some delegation of ministerial authority to the Board should eventuate from the President's approval of the proposed regulation, there is no reason now to assume that such a delegation of power by the President would be improper."

It is at least highly doubtful that the President could, consistently with Section 801(a), delegate his responsibilities under that section, which are directed to him personally and have been personally exercised by all Presidents, to anyone. See *Runkle* v. *U.S.*, 122 U.S. 543 (1887). In any case, it would make a mockery of the Section 801(a) requirement of Presidential review and approval of *Board* decisions for such responsibilities to be delegated to the Board. There is no formal delegation by Executive Order and none should be presumed. The issuance of Order 76-9-74 without adherence to Section 801(a) cannot be justified on a theory of Presidential delegation.

It may also be noted that even if some lawful Presidential delegation to the Board to issue "first stage" orders under Section 213.3(*c*) of the regulation were inferred from the President's approval of Part 213, that delegation was specifically revoked as to Order 76-9-74 by the President's request to the Board for "prompt rescission" of that order (A.39). There is nothing ambiguous about that request. The word "rescind" means to abrogate, annul, revoke, repeal; to invalidate an act or measure by a later action or higher authority.* In law it is understood, as in "rescission" of a contract, to mean abrogation or voiding from the inception, as though it never were.** If a Presidential delegation were assumed, then Order 76-10-110, refusing the President's request to rescind Order 76-9-74, was in excess of delegated authority.

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* *Random House Dictionary of the English Language,* Unabridged, 1967 ed., p. 1219.

** *Black's Law Dictionary,* Fourth Edition, West Pub. Co., p. 1471.

B. Order 76-9-74 Placed British Airways At An Operating Disadvantage In Violation of the "Fair and Equal Opportunity" Requirement of Paragraph (4) of the Bermuda Agreement Final Act And In Violation of Section 1102 of the Act.

The Bermuda Agreement provides in paragraph (4) of the Final Act as follows:

> "That there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories (as defined by the Agreement) covered by the Agreement and its Annex."

Manifestly, the Board's action in Order 76-9-74 to restrict British Airways' ability to initiate new services and to change existing services as to frequency, equipment type, numbers of passenger seats, days of operation or arrival and departure times of flights was at variance with this "fair and equal opportunity" requirement of the Bermuda Agreement. No comparable restrictions were imposed upon the various U.S.-flag carriers with which British Airways competes on routes covered by the agreement.

The Board has made no pretense that its action could be squared with the obligations assumed by the United States in the Bermuda Agreement. Rather, its orders in Docket 29778 are replete with references to the retaliatory nature of its action in relation to an alleged violation of the agreement by the United Kingdom (A.3-4, 30-31, 33, 36-37, 62). However, even if the charitable assumption were made that actions proposed by the United Kingdom Government which were then the subject of consultations provided for in Article 13 of the Bermuda Agreement, which were never implemented, and which were identical to actions the United States asserts the right to take, could somehow be regarded as a violation of the agreement on some undefined theory of "anticipatory breach," the

Board's action in Order 76-9-74 was, nevertheless, improper as a matter of law.

It is fundamental law that the violation of an international agreement by one party does not in and of itself suspend the obligations of the other party thereunder. This principle was affirmed by the Supreme Court in *Charlton* v. *Kelly*, 229 U.S. 447 (1913), where the Court approved the extradition of a U.S. citizen to Italy notwithstanding Italy's refusal to extradite Italian citizens to the United States under the extradition treaty. As stated by the Court:

> "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach." 229 U.S. at 473.

The Court noted with approval the memorandum submitted to it by the Department of State in that case to the effect that,

> ". . . even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us." 229 U.S. at 475.

Finally, the Court in the *Kelly* case made it quite clear that it is the Executive Branch of our government that determines as a political matter whether to abrogate an international agreement or suspend U.S. obligations there-

under in view of a purported breach by the other party. As stated by the Court:

> "The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this Court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition." 229 U.S. at 476.

The Executive Branch has not taken, and had not taken when Order 76-9-74 was issued, any action to abrogate the Bermuda Agreement or to suspend the performance of any obligations of the United States thereunder. In the absence of any such action, the Board was under the same "plain duty" that governed the Supreme Court in the *Kelly* case to observe the obligations of the agreement.

The Board as an independent regulatory agency does not, under any theory of delegation or otherwise, have authority to make the political decision to abrogate or suspend the obligations of an international agreement of the United States. Any possible doubts on this score were laid to rest by Congress in Section 1102 of the Act which provides that the Board, in exercising its powers and duties under the Act,

> ". . . shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries . . ."

Despite this specific mandate the Board acted in Order 76-9-74 in a manner that was clearly inconsistent with the obligations assumed by the United States in the Bermuda Agreement, then and now in force. It is, perhaps, significant that the Board did not address the merits of this contention, which was clearly made to the Board, in its

orders in this case. We submit that the violation of Section 1102 is so patent that there is no reasonable argument to be made in defense of the Board's action.

C. The President's Approval of Part 213 Does Not Bar Review By this Court for Noncompliance With Sections 402(f), 801(a) and 1102 of the Act and the Bermuda Agreement, of Order 76-9-74 Which Was Not Approved By the President

In denying British Airways' application for stay pending review, the Board in Order 76-9-161 (A.35) expressed the view that its compliance with Sections 402(f), 801(a) and 1102 of the Act and with the provisions of the Bermuda Agreement would not be reviewable as follows:

> "Insofar as it is argued that the order is contrary to Sections 402, 801 and 1102 of the Act, and the provisions of the Air Transport Services Agreement between the United States and the United Kingdom, these arguments are, for the most part, identical to those made by the British carrier in the original Part 213 proceedings. The arguments were there rejected. The Board order adopting Part 213 was approved by the President and, as noted, made a condition to British Airways' permit. Such determinations cannot be collaterally attacked in the instant proceeding. See, *Dan-Air Services* v. *C.A.B.*, 475 F. 2d 408 (C.A.D.C., 1973)."

1. Part 213 Does Not Require the Board to Act As It Did In Order 76-9-74 And Review Of the Order For Noncompliance With Sections 402(f), 801(a) and 1102 of the Act and the Bermuda Agreement Is Not Collateral Review of the Regulation

The Board's effort to sweep the manifest transgressions of its statutory mandate in this case under the rug of Presidential actions not reviewable under Section 1006(a) of the Act will not wash. There are too many loose ends—too much dirty linen is showing around the edges of the rug.

The decision to issue Order 76-9-74 summarily without complying with the plain notice and hearing requirements of Section 402(f), and without seeking Presidential approval of it under Section 801(a), was the *Board's* decision, not that of the President. Part 213 as approved by the President does not by terms *require* the Board to violate its statutory mandate in these respects, and it would be improper to impute to the President any intention to authorize such violations—an action clearly beyond his power. Thus, Section 213.3(c) of the regulation provides that an order may be issued thereunder "with or without hearing;" it does not require summary action. Equally, while the regulation does not expressly require Presidential approval of a first stage order (just as Section 402 of the Act does not expressly require the Board to seek Presidential approval of action thereunder), neither does it preclude seeking such approval in a case where Section 801(a) of the Act requires it. It may be noted that in contesting the claim that Part 213 violated Sections 402(f) and 801(a) of the Act in *British Overseas Airways Corp.* v. *C.A.B., supra,* the Board specifically argued that the claim went to the procedures to be used by the Board in implementing the regulation and not to the validity of the regulation itself.*

There is no basis whatsoever for the Board's contention that review of Order 76-9-74 insofar as it violated the Bermuda Agreement and Section 1102 of the Act would be review of the President's actions in approving Part 213. The decisions of the Board approved by the President were replete with vows never to act inconsistently with international obligations of the United States. Thus, in Order E-17537, *supra,* the Board plainly asserted:

> "Finally, the promulgation of the proposed new part 213 would not require the Board to take any of the actions which are now being protested by the foreign

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* See, Brief for Respondent, March, 1962, to the Court of Appeals for the District of Columbia in No. 16,640 et al., p. 34.

> carriers. We have tried to make it abundantly clear that if adopted by the Board the proposed new part 213 of the Economic Regulations would be only an enabling regulation and would not be self-executory. The Board contemplates no action at any time which would be inconsistent with any outstanding international agreement, treaty, or convention. On the other hand, it must be recognized that bilateral agreements are subject to amendment after consultations of both of the parties thereto at any time and that such agreements are also subject to denunciation by either of the parties at any time." 34 CAB at 839

It cannot be inferred from the President's approval of such sentiments as these that he authorized or directed in Part 213 the Board's action in Order 76-9-74 to violate the Bermuda Agreement and Section 1102 of the Act. To the contrary, it appears the Board affirmatively represented that it would await the appropriate Executive Branch action of denouncing, abrogating or suspending U.S. obligations before taking any such action.

2. Review of the Board's Authority To Issue Order 76-9-74 Is In Any Case Authorized By Section 1006(a) of the Act

While it is clear that review of Order 76-9-74 simply does not entail review of Presidential action approving Part 213, we nevertheless believe it important to point out the dangers inherent in the Board's legal position.

The Board's position is that Order 76-9-74 is not reviewable either by the Court or by the President. It claims the Court cannot review the Board's power to issue that order since this would entail review of the President's action approving Part 213. On the other hand, the Board, asserting its status as an "independent agency," refuses to accede to the President's request for prompt rescission of the order. The Board cannot have it both ways. Its tautologi-

cal position does violence to both the provisions of Section 1006(a) of the Act for judicial review and the provisions of Section 801(a) for Presidential approval.

Order 76-9-74 was not made "subject to the approval of the President" and as such is expressly reviewable under Section 1006(a) of the Act. The *Dan-Air Services* case relied upon by the Board holds as much. However, the Board, relying upon *dictum* in that decision, would argue that this Court's power to review that order does not include the power to review the Board's *jurisdiction* to issue the order because this might collaterally call into question the Presidentially-approved Part 213 regulation under which it was issued. This, we submit, is plainly wrong.

This Court has held that even a Board order *actually approved* by the President under Section 801(a) may be set aside for lack of jurisdiction in the Board on the ground that absent lawfully exercised Congressional authority in the Board's action, in the first instance, there was nothing Presidential action could approve. *Pan American World Airways, Inc.* v. *C.A.B.*, 380 F. 2d 770 (2d Cir. 1967), aff'd 391 U.S. 461. In that case this Court expressed its agreement with Judge (now Chief Justice) Burger's opinion to the same effect in *American Airlines, Inc.* v. *C.A.B.*, 348 F. 2d 349 (D.C. Cir. 1965). It may be noted that this decision clarified the original decision in *British Overseas Airways Corp.* v. *C.A.B., supra,* as follows:

> ". . . [O]ur somewhat cryptic observation as to unavailability of judicial review 'now or later' in British Overseas Airways Corp. v. C.A.B., 113 U.S. App. D.C. 76, 304 F. 2d 952 (1962) is dictum. The holding of that case is only that the Board's denial of a motion to dismiss a proceeding as unauthorized is a non-final order and therefore unreviewable in a Court of Appeals. This court's reference to *Waterman* as precluding Court of Appeals review 'now or later'—the 'later' being *after* Presidential action, if any—went

> beyond the needs of the holding; that *Waterman* precluded Court of Appeals review as the case *then* stood —the 'now' in the context of the opinion—could mean only that this court concluded that the Board's order was non-final, since lack of finality is the only ground *Waterman* gives for the non-reviewability of Board orders *prior* to Presidential action." 348 F. 2d at 352-353.

If the Courts of Appeals can set aside Board orders actually approved by the President for lack of jurisdiction in the Board in the first instance, then there can be no question of this Court's power to set aside for lack of jurisdiction a Board order *not* approved by the President, whether or not it was issued under a regulation the President approved.

In the last analysis, the Board is "entirely a creature of Congress." *C.A.B.* v. *Delta Air Lines, Inc., supra.* All actions of the Board must be based upon authority granted by Congress. The Board simply cannot be heard to argue in this Court that it has acquired powers from *any* source to act in a manner contrary to its statutory mandate. In the absence of any statutory basis for the Board's Order 76-9-74, and in view of its manifest conflict with the Board's statutory obligations, the order should be set aside without more.

II.

Order 76-9-74 did not comply with Section 213.3(c) of the Board's regulations as approved by the President.

While the Board was without authority to issue Order 76-9-74, as we have demonstrated, it may also be noted that the order was not issued in conformity with the Part 213 regulation under which the Board purported to act.

Section 213.3(c) of the regulation explicitly requires the Board to find that a foreign government *has taken* ac-

tion, over the objection of the U.S. Government, that impairs, limits, terminates or denies operating rights of a U.S. carrier, or *has denied* a fair and equal opportunity to exercise such operating rights before issuing an order thereunder. The Board made no such findings in Order 76-9-74. By their terms the Board's findings in that order related to *proposed* action of the U.K. Government that would, if implemented over the objection of the U.S. Government, have caused in the Board's view the impairment or limitation of operating rights or denial of a fair and equal opportunity contemplated by Section 213.3(c). As we have previously observed, the United Kingdom's proposed action to which the Board had reference was never implemented and never at any time operated to restrict the operations of any carrier. At the time Order 76-9-74 was issued intergovernmental consultations with respect to the proposed action, and the objection of the U.S. Government to it, were actively in progress. Those consultations in fact led to a mutually agreed solution that obviated any question of there being restrictive action by the United Kingdom taken over the objection of the U.S. Government.

The difference between what the regulation, as approved by the President, requires and what the Board actually did in Order 76-9-74 is all the difference between retaliation and striking the first blow.

While the language of the regulation is clear enough, its meaning is underscored in the June 3, 1970 letter of President Nixon approving the regulation, which stated in relevant part as follows:

> "T' intention of the Board to use these powers sparingly and only after other nations have taken unwarranted restrictive action against United States carriers is consistent with our aviation policy." (A.73)

The Board's tortured effort to cure the deficiencies in its Order 76-9-74 findings in its subsequent order upon British Airways' motion for a stay (A.33) simply highlights

them. The Board there argues that it would be "unreasonable" to construe the regulation to require it to wait until the "full damaging effects of the foreign government's restrictive action had actually taken place before the U.S. Government was in a position to take the appropriate retaliatory action under the Part 213 procedures." Apart from the plain language of the regulation itself, we submit there is nothing "unreasonable" about requiring the Board's hand to be stayed until foreign restrictions have actually taken effect. Indeed, President Nixon cited an excellent reason in his June 3, 1970 letter, *supra,* when he indicated simply that it was U.S. policy not to be the first to impose restrictions. Moreover, the Board's construction would simply ignore the requirement of Section 213.3 (c) that the alleged foreign government restriction be imposed "over the objection of the United States Government." The regulation plainly contemplates resort to reason before resort to retaliation is had. The regulation requires that the U.S. Government shall have objected and the foreign government shall, nevertheless, have acted over such objection. It was patently improper for the Board to issue Order 76-9-74 while consultations were in progress regarding a U.S. Government objection to a proposed U.K. Government action that had not been implemented (and, as it develops, will not be) "over the objection of the United States Government."

Conclusion

For the reasons stated above, the Board's Order 76-9-74, as modified by its Orders 76-9-161 and 76-10-110, issued in the Board's Docket No. 29778, should be set aside.

Respectfully submitted,

WILLIAM C. CLARKE
PETER F. VETRO
Attorneys for Petitioner
BRITISH AIRWAYS BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRITISH AIRWAYS BOARD,

Petitioner,

against

CIVIL AERONAUTICS BOARD,

Respondent.

State of New York,
County of New York,
City of New York--ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 12th day of January, 1977, he served three copies of the Petitioner's Brief on James C. Schultz, Esq. General Counsel

the attorney for the Respondent
by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. Civil Aeronautics Board, Washington, D.C.) ~~N.Y.~~, that being the address designated by him for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
12th day of January, 1977.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978